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## CAUSATION IN THE FIDUCIARY REALM

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### INTRODUCTION

In their magisterial treatment of the shape and significance of causal questions in the law, H.L.A. Hart and Tony Honoré wrote that “the narrative of history is scarcely ever a narrative of brute sequence, but is an account of the roles played by certain factors and especially by human agents.”<sup>1</sup> This is so because “[h]istory is written to satisfy not only the need for explanation, but also the desire to identify and assess contributions made by historical figures to changes of importance; to triumphs and disasters, and to human happiness or suffering.”<sup>2</sup> Like historians, judges and others who articulate and apply legal doctrine must identify and assess how actors’ contributions may change circumstances. Although the relationships between causal inquiry and ultimate legal responsibility are complex, questions of causation are usually inescapable if not dispositive for the normative attributions that underlie legal outcomes.<sup>3</sup>

From the standpoint of causal inquiry, the liability for breach of the fiduciary duty of loyalty and the remedies available to one wronged by a fiduciary’s breach are distinctive. This point buttresses Professor Frankel’s

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<sup>1</sup> H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 63 (2d ed. 1985).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at xxxv (“That we are responsible for the harm we cause is a principle that makes an immediate appeal to common moral sensibility.”).

central claim that fiduciary law encompasses a distinctive set of actors who furnish services to others and who are subject to a distinctive body of law that also embodies a distinctive remedial regime.<sup>4</sup> Substantively, “fiduciary law” is distinctive because it imposes a duty of loyalty that “supports the main purpose of fiduciary law: to prohibit fiduciaries from misappropriating or misusing entrusted property or power.”<sup>5</sup> Likewise, when a fiduciary breaches the duty of loyalty, a distinctive remedy is available to the beneficiary – disgorgement of the benefit that the fiduciary obtained through the breach.<sup>6</sup>

But there are additional dimensions, both of liability for breach of a duty of loyalty and the available remedies, that complement this account and warrant closer examination. For starters, it is long-established law that a beneficiary who suffers an injury as a consequence of a fiduciary’s disloyal act may recover quantifiable losses from the fiduciary.<sup>7</sup> That a disloyal fiduciary is subject to liability for harm inflicted on the beneficiary as a consequence of the breach parallels the basic remedial consequence of tort law and may help explain why, in the United States, breach of fiduciary duty is defined as a tort.<sup>8</sup> The remedial consequences of disloyalty also call into question how tight the causal link must be between a fiduciary’s breach and the beneficiary’s loss, as well as the demands of tort law’s foundational requirement of but-for causation.

Additionally, a distinctive variety of dualism permeates both the substance of fiduciary liability and the available remedies. That is, a disloyal fiduciary, subject to liability for harm caused to the beneficiary, must also disgorge benefits obtained or derived from the disloyal conduct. Each side of fiduciary liability – one stemming from the law of restitution, the other closely

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<sup>4</sup> See TAMAR FRANKEL, *FIDUCIARY LAW* 240 (2011).

<sup>5</sup> *Id.* at 108.

<sup>6</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(1) (Tentative Draft No. 4, 2005); E. Allan Farnsworth, *Your Loss or My Gain?: The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1355 (1985).

<sup>7</sup> RESTATEMENT (SECOND) OF TORTS § 874 (1979) (“One standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of duty imposed by the relation.”). Not all states characterize breach of fiduciary duty as an independent tort. See, e.g., *Kinzer v. City of Chicago*, 539 N.E.2d 1216, 1220 (Ill. 1989) (finding that breach of fiduciary duty is controlled by substantive law of agency, contract, and equity).

<sup>8</sup> Other common law jurisdictions do not situate breach of fiduciary duty within the taxonomy of tort law, as does the United States. For a discussion of the distinctions between tort law and fiduciary duty based on the law of the United Kingdom and the Commonwealth, see MATTHEW CONAGLEN, *FIDUCIARY LOYALTY* 229-35 (2010). A question beyond the scope of this Article is the overall severity and significance of difference between U.S. law and that of the United Kingdom and the Commonwealth jurisdictions. On related questions in connection with trusts in non-common law systems, see *COMMERCIAL TRUSTS IN EUROPEAN PRIVATE LAW* (Michele Grazadei, Ugo Mattei & Lionel Smith eds., 2005).

associated with tort law – is conceptually distinct, with but-for causation much more prominent when the beneficiary seeks compensation for loss. Indeed, some courts treat but-for causation as an essential element of a beneficiary's claim against a disloyal fiduciary when the beneficiary seeks to recover compensatory damages for losses caused by the fiduciary's wrongdoing. However, when the beneficiary seeks disgorgement of the fiduciary's illicit gains, the absence of but-for causation does not necessarily exonerate the fiduciary.<sup>9</sup> Put differently, but-for causation is not dispositive of restitutionary liability.

Each side of fiduciary liability also uses a distinctive vocabulary. Within restitution, a disloyal fiduciary “obtains” or “derives” benefits through wrongful conduct,<sup>10</sup> terms that hint at causal connections but do not explicitly articulate them. So foreign might the vocabulary of causation seem to disgorgement that, in the assessment of a leading scholar of contract law, the courts ordering the remedy are “oblivious to the question of cause in fact,”<sup>11</sup> and pay “little regard to questions of cause in fact.”<sup>12</sup> In fact, as this Article elaborates, causal concepts are germane to disgorgement. Implicit in some respects in the beneficiary's *prima facie* case, doctrines derived from these causal concepts connect recoverable gains to the fiduciary's wrongful conduct. Additionally, causal inquiry is essential to liability for assisting a fiduciary's disloyal conduct. Not only must the defendant have known of the disloyalty, the defendant must also have participated in the fiduciary's disloyal act by furthering it in a specific way.<sup>13</sup>

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<sup>9</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, cmt. e(1) (Tentative Draft No. 5, 2007). As the Comment observes:

To take an obvious example, a trustee who makes a profit from the personal use of trust assets could not escape liability in restitution by proving that he could have (and would have) made the same profit legitimately, if only his access to the trust assets had been hindered in some way.

*Id.* Additionally, if the trustee takes the trust assets and invests them on his own account, many factors “independent of the wrong” will contribute to the success or failure of the investment, including market conditions and the trustee's investment acumen. *Id.* Restitutionary liability embodies a causal presumption that, but for the breach, the trustee would not have realized the profit as well as “an implicit judgment that the claimant, rather than the wrongdoer, should . . . obtain the benefit of the favorable market conditions, acumen, or luck, as the case may be.” *Id.*

<sup>10</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(1), (2)(a) (Tentative Draft No. 4, 2005).

<sup>11</sup> Farnsworth, *supra* note 6, at 1362.

<sup>12</sup> *Id.* at 1359. Causal and other issues that delimit recovery in restitution may also have been slighted by authorities in the Anglo-Commonwealth tradition. See Peter Devonshire, *Account of Profits for Breach of Fiduciary Duty*, 32 SYDNEY L. REV. 389, 402 (2010) (“Overall it seems that the role of limiting principles in defining the scope of an account of profits has received less analytical attention than the corresponding rules for compensation.”).

<sup>13</sup> See, e.g., *BBS Norwalk One, Inc. v. Raccolta, Inc.*, 60 F. Supp. 2d 123, 130 (S.D.N.Y.

The bite of but-for causation is troubling when a beneficiary claims that a fiduciary's disloyalty biased or compromised the fiduciary's performance of functions or duties, resulting in harm to the beneficiary. We might be concerned that the fiduciary's disloyalty inflicted loss on the beneficiary by warping how the fiduciary performed, depriving the beneficiary of the value of loyal performance but doing so in a manner that is difficult to prove. As it happens, jurisdictions in the United States do not use the same standard to shape the causal inquiry in such cases. In some, the causal question is whether the fiduciary's breach of duty was a "substantial factor" in the complex of causative factors leading to the loss to the beneficiary. Other jurisdictions, in contrast, require a beneficiary who seeks compensation for loss from a disloyal fiduciary to establish that, but for the breach, the loss would not have occurred.

Part I begins by examining the basic nature of causal inquiry when a beneficiary seeks disgorgement of gains realized by the fiduciary through a breach of loyalty, including the limits of the fiduciary's liability. Consistent with Professor Frankel's central claim, the same causal questions arise across instances of disloyalty by different types of actors in fiduciary roles, including agents, trustees, lawyers, and financial advisers. Beyond the basics, Part I.B engages the more controverted question of defining circumstances in which the causal connection between disloyalty and the fiduciary's gain comes to an end, either because an independent cause intervened or the causal force of the disloyalty otherwise ran out. Part II focuses on causal questions when a beneficiary seeks a compensatory remedy for losses suffered due to a fiduciary's disloyalty. After surveying competing approaches to but-for-causation, this Part argues that tests of causation in this context should not bite so sharply that the underlying objectives of fiduciary accountability are undermined. Part III expands the theoretical frame of reference by situating causal questions prompted by the breach of fiduciary duty adjacent to related questions in torts, focusing in particular on similarities and distinctions between fraud and fiduciary disloyalty. The Article concludes by circling back to Hart and Honoré. The causal questions that are explicitly or implicitly triggered by breaches of the fiduciary duty of loyalty are not answered by narratives of brute sequence because these questions necessarily involve assessing a fiduciary's ultimate responsibility for consequences. The nature of a fiduciary's undertaking of loyal service should shape how the law assesses causation.

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1999); *Wirum & Cash, Architects v. Cash*, 837 P.2d 692, 713 (Alaska 1992) ("A person who knowingly assists a fiduciary in committing a breach of trust is himself guilty of tortious conduct and is subject to liability for the harm thereby caused." (quoting RESTATEMENT (SECOND) OF TORTS § 874, cmt. c (1979))); *see also* Richard C. Mason, *Civil Liability for Aiding and Abetting*, 61 BUS. LAW. 1135, 1159-64 (2006) (discussing the elements of a claim for aiding and abetting a breach of fiduciary duty).

## I. BENEFITS OBTAINED IN BREACH OF FIDUCIARY DUTY

A. *The Basic Principle*

Disgorgement of ill-gotten gain is well-established as a remedial consequence when a fiduciary obtains a benefit in breach of a duty of loyalty.<sup>14</sup> Likewise, as formulated in the Restatement (Third) of Restitution, a third party must account to the beneficiary of the duty for benefits the third party obtains “in consequence of” the fiduciary’s breach.<sup>15</sup> In many cases that illustrate this principle in application, the causal link between the fiduciary’s breach and the benefit in question is straightforward because the fiduciary obtained the benefit by misappropriating either the beneficiary’s property or an asset to which the beneficiary is entitled, often because the fiduciary has control over the beneficiary’s assets as a trustee or otherwise.<sup>16</sup> However, the remedy is also available when a fiduciary – such as an agent – who does not control property of the principal nonetheless acquires a benefit without the principal’s consent by using the fiduciary’s position, often in connection with transactions conducted on behalf of the principal.<sup>17</sup> Side-benefits to an agent often stem from payments or other benefits furnished by third parties with whom the agent deals on the principal’s behalf. When the principal purchases from a third party through the agent, such extractions are likely to raise the cost of the transaction for the principal, or, correspondingly, to reduce the benefit realized by the principal when the principal sells to the third party through the agent.<sup>18</sup>

Additionally, an agent’s disgorgement mandate extends to benefits that are not so directly derived at the principal’s expense and to circumstances in which the agent’s disloyal conduct may not directly inflict loss on the principal. For example, in *Phansalkar v. Anderson Weinroth & Co.*,<sup>19</sup> a banker employed as a deal adviser and facilitator by an investment bank accepted investment opportunities (including stock options) for his own account from clients with whom he worked on transactions on the bank’s account, doing so without his employer’s consent or knowledge.<sup>20</sup> The court, finding that the banker thereby breached his duty of loyalty, held him liable to his employer for profits he

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<sup>14</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(1) (Tentative Draft No. 4, 2005).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* § 43(1) cmt. c, illus. 3-6.

<sup>17</sup> RESTATEMENT (THIRD) OF AGENCY § 8.02 (2006).

<sup>18</sup> See, e.g., *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 592 (Iowa 1999) (observing that the general manager of used car lot personally received \$700 for purchasing used cars from a seller, corresponding with a decline in the lot’s profit margins); *Hadden v. Consol. Edison Co.*, 382 N.E.2d 1136, 1138 (N.Y. 1978) (describing how the corporation’s vice president received bribes and secret cash “gifts” from construction firms with which the corporation did business).

<sup>19</sup> 344 F.3d 184 (2d Cir. 2003).

<sup>20</sup> *Id.* at 203.

made or property he obtained, such as shares of stock via the exercise of stock options received from his employer's clients.<sup>21</sup> The investment opportunities stemmed directly from the banker's performance of work for his employer's clients, which groups the benefits with other compensation due the employer for its services.<sup>22</sup> Moreover, as the firm's representative, the banker acted as an adviser on his employer's behalf with consequences that might prove disadvantageous for the firm; by not informing his employer of the side-benefits, the banker deprived the firm of its opportunity to assess whether its interests would better be served if it were his sole source of remuneration.<sup>23</sup>

In side-benefit cases, it's tempting to rationalize the restitutionary remedy against a disloyal agent or other fiduciary as restoring property to the principal wrongfully taken by the agent, comparable to undoing a fiduciary's misappropriation of assets owned by the principal. This explanation stretches the definition of property to encompass assets, like the investment opportunities in *Phansalkar*, to which the principal had no claim absent the agent's breach of duty.<sup>24</sup> Additionally, a fiduciary must disgorge benefits obtained by using his or her position when the principal could not itself have obtained the benefits, a point most vividly established in cases subjecting the fiduciary to liability to account for bribes or other illegal payments received from third parties.<sup>25</sup> The reach of the disgorgement remedy thus strains the property metaphor to an untenable point. The remedy is better grounded in its

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<sup>21</sup> *Id.* at 211. More controversially, the court held that all of the banker's compensation during the period of disloyalty could be forfeited to his employer. For a discussion of this aspect of *Phansalkar*, see Deborah A. DeMott, *Disloyal Agents*, 58 ALA. L. REV. 1049, 1059-61 (2007).

<sup>22</sup> *Phansalkar*, 344 F.3d at 203.

<sup>23</sup> See RESTATEMENT (THIRD) OF AGENCY § 8.02, cmt. b (2006) ("Although the agent may believe that no harm will befall the principal, the agent is not in a position disinterestedly to assess whether harm may occur or whether the principal's interests would be better served if the agent did not pursue or acquire the benefit from the third party.").

<sup>24</sup> For further criticism of property-based metaphors in this context, see JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 454-55 (2006) ("The dishonest fiduciary and the thug take money for depriving plaintiff of something to which he is entitled; so does one who sells another's property; therefore they violated a property-like right. All cats die; Socrates is dead; therefore Socrates is a cat.").

<sup>25</sup> See, e.g., *Jersey City v. Hague*, 115 A.2d 8, 17 (N.J. 1955) (holding that city could recover through constructive trust monies extorted by former city officials from city employees); *Hadden v. Consol. Edison Co.*, 312 N.E.2d 445, 447 (N.Y. 1974) (declining to review the lower court's grant of summary judgment requiring employee to disgorge bribes obtained); see also *S.E.L. Maduro (Fla.), Inc. v. M/V Santa Lucia*, 116 F.R.D. 289, 297 (D. Mass. 1987) (allowing defendants to amend their answer to include a defense that the contract upon which plaintiffs sought to recover was void as a matter of public policy due to a breach of fiduciary duty in the form of illegal kickbacks).

functional objectives – precluding the prospect of profit through breach of fiduciary duty and deterring breach.<sup>26</sup>

### B. *Limits to Recovery*

A basic limit to a fiduciary's liability to disgorge ill-gotten gain is causal – the liability does not extend to assets acquired in a manner unrelated to the breach of duty. Subject to that basic limit, a fiduciary's disgorgement liability extends to consequential gains.<sup>27</sup> Thus, in *Phansalkar*, the banker's liability extends to assets acquired via exchanging the investment opportunities accepted from his employer's clients, beginning with shares of stock acquired through the exercise of stock options.<sup>28</sup> On the other hand, assets that the banker acquired independently of the breach are not vulnerable to disgorgement because the disgorgement remedy does not operate as a general forfeiture of assets held by a disloyal fiduciary.<sup>29</sup>

A further limit on disgorgement bears a strong resemblance to proximate-cause and remoteness limits on recovery for losses that are causally linked to an actor's tortious conduct.<sup>30</sup> Somewhat intuitive and imprecisely phrased, this limit reflects a range of concerns that bear on whether the fiduciary would be unjustly enriched unless a particular asset or profit is disgorged.<sup>31</sup> For starters, a defendant's profits may be too remotely situated from the breach because they cannot be quantified with sufficient precision.<sup>32</sup> The fact that a fiduciary

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<sup>26</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, cmt. b (Tentative Draft No. 4, 2005). Professor Gordley notes that, in many cases, fiduciaries are required to disgorge only benefits “a principal might have obtained for himself.” GORDLEY, *supra* note 24, at 457. Other instances are, in his view, “at best, efforts at prophylaxis . . . and at worst, overly zealous overreactions.” *Id.*

<sup>27</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 53(3) (Tentative Draft No. 5, 2007).

<sup>28</sup> *Phansalkar v. Anderson Weinroth & Co.*, 344 F.3d 184, 208-09 (2d Cir. 2003).

<sup>29</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, cmt. e(4) (Tentative Draft No. 5, 2007) (“Disgorgement does not impose a general forfeiture: defendant's liability in restitution is not the whole of the gain from a tainted transaction, but the amount of the gain that is attributable to the underlying wrong.”).

<sup>30</sup> On the limitation more generally, see Lionel Smith, *The Measurement of Compensation Claims Against Trustees and Fiduciaries*, in *EXPLORING PRIVATE LAW* 363, 368-69 (Elise Bant & Matthew Harding eds., 2010) (“The reason that we do not allow recovery (in tort or contract or breach of fiduciary obligation) for all losses that are linked in a but-for sense to the breach is that we think that this would cast the net of moral and legal responsibility too widely.”). Professor Smith acknowledges that Hart and Honoré wrote *Causation in the Law* around this premise. *Id.* at 369 n.16.

<sup>31</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51 cmt. e(1) (Tentative Draft No. 5, 2007) (acknowledging the imprecision of the remoteness standard but justifying its use “because it summarizes in intuitive fashion a variety of concerns that are potentially relevant to the ultimate issue of unjust enrichment”).

<sup>32</sup> *Id.*

holds a particular asset or has realized particular profits may also be over-determined; that is, multiple causes, each sufficient to explain the outcome, are present. Over-determination can compound quantification problems when the fiduciary's own efforts legitimately contributed to the profit.<sup>33</sup>

To illustrate, consider the remedies potentially available to the plaintiff in *EBC I, Inc. v. Goldman Sachs & Co.*,<sup>34</sup> in which the plaintiff – the creditors' committee suing on behalf of eToys, Inc. – alleged that Goldman breached its fiduciary duty to eToys in connection with its initial public offering (IPO).<sup>35</sup> The plaintiff alleged that Goldman, engaged by eToys as its IPO underwriter, also undertook to advise it about pricing the IPO.<sup>36</sup> In so advising eToys, Goldman allegedly failed to disclose the existence of arrangements with other customers to whose accounts it allocated IPO shares in exchange for a share of any profits the customers made when they sold the shares at a price higher than the IPO price.<sup>37</sup> According to the plaintiff, these arrangements gave Goldman an incentive to underprice the IPO.<sup>38</sup> The court held that the complaint's allegations of an advisory relationship, independent of the contractually-specified underwriting relationship, sufficed to allege the existence of a fiduciary relationship.<sup>39</sup> "Goldman Sachs breached this duty by allegedly concealing from eToys its divided loyalty arising from its profit-sharing arrangement with clients,"<sup>40</sup> which constituted a material conflict of interest.<sup>41</sup>

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<sup>33</sup> See *id.*

<sup>34</sup> 832 N.E.2d 26 (N.Y. 2005).

<sup>35</sup> *Id.* at 30.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* ("As a result of this undisclosed scheme, Goldman Sachs was allegedly paid 20% to 40% of the clients' profits from trading the eToys securities.").

<sup>38</sup> *Id.* When the underwriting agreement was finalized, eToys agreed to sell shares to Goldman at \$18.65 and Goldman agreed to offer the shares to the public at \$20. *Id.* at 29. On the first day of trading, eToys opened at \$79, rose as high as \$85, then closed for the day at \$76.56. *Id.* at 29-30. Shortly after the end of the year, the stock traded below \$20; a bankruptcy filing followed within two years of the IPO. *Id.* at 30.

<sup>39</sup> *Id.* at 31 ("Essentially, according to the complaint, eToys hired Goldman Sachs to give it advice for the benefit of the company, and Goldman Sachs thereby had a fiduciary obligation to disclose any conflict of interest concerning the pricing of the IPO.").

<sup>40</sup> *Id.* For recognition that an advisory relationship may give rise to a fiduciary relationship, even when the parties' agreement does not specifically require advice about a particular matter or type of transaction, see *Pergament v. Roach*, 838 N.Y.S.2d 591, 594 (App. Div. 2007) (finding that, in spite of the lack of a provision requiring advice on equity financing, general provision in agreement requiring financial advisers to provide "customary financial consulting advice as is reasonably requested" along with evidence that the advisers had previously discussed equity financing with the client was sufficient to preclude judgment as a matter of law that no fiduciary relationship existed between the advisers and the client).

<sup>41</sup> *EBC I, Inc.*, 832 N.E.2d at 32.



Intriguing though it is to wonder why the defendant would trade off a loss in underwriting commissions – generated by underpricing the IPO – for a share in its customers’ profits, our immediate focus is the remedies potentially available to eToys’s representative.<sup>42</sup> First, eToys may establish that, had it known of the profit-sharing arrangements, it would not have agreed to sell its shares in an IPO for a lower price than the market might have borne. If so, eToys suffered a harm that resulted from Goldman’s breach of duty in failing to disclose these arrangements. As discussed further in Part II, eToys’s loss, if quantifiable, may be recoverable. Second, if Goldman’s failure to disclose its profit-sharing agreements with customers breached its duty of loyalty to eToys (its advisory client), payments Goldman received from customers are benefits received “in breach of a fiduciary duty,” and Goldman may have to disgorge these payments.<sup>43</sup>

More complicated is whether restitutionary liability might extend any further. In general, the law of restitution measures enrichment resulting from a payment of money by “the consequent increase in the net assets of the person enriched.”<sup>44</sup> When the defendant is a wrongdoer (such as a disloyal fiduciary), the measure of unjust enrichment cannot be “less than the market value of the benefits wrongfully obtained,”<sup>45</sup> plus the amount representing “the net profit attributable to the underlying wrong,” if any.<sup>46</sup> The underlying objective, which is profit-stripping but not the imposition of penalties,<sup>47</sup> recognizes that a defendant may legitimately make investments from funds untainted by the breach that enhance the portion of its business implicated in the breach.<sup>48</sup> Within this framework, might eToys succeed in claiming a share of Goldman’s profits from additional business with customers grateful for their allocations of low-priced shares in eToys’s IPO? Many factors might explain the incidence of subsequent transactions, including strengths and attractions of Goldman as a provider of financial services and products that are distinct from its practice of allocating IPO shares. Although courts recognize the difficulty of measuring gain in unjust enrichment cases and ordinarily permit a claimant to meet its burden of proof by presenting “a coherent theory of recovery” explaining how

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<sup>42</sup> As of 2008, the parties were engaged in discovery prior to trial. See *EBC I, Inc.*, No. 601805/2002, 2008 WL 4612640 (N.Y. Sup. Ct. Apr. 30, 2008) (trial order addressing discovery costs).

<sup>43</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43(1)(a), (2)(a) (Tentative Draft No. 4, 2005).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* § 51(2).

<sup>46</sup> *Id.* § 51(3).

<sup>47</sup> *Id.* § 49(1).

<sup>48</sup> *Id.* § 51(4)(c) (“A wrongdoer may be allowed a credit for money expended in acquiring or preserving the property or in carrying on the business that is the source of the profit subject to disgorgement. By contrast, a wrongdoer will ordinarily be denied any credit for direct contributions in the form of services, or for expenditures incurred directly in the commission of a wrong to the claimant.”).

the defendant's "wrong has proximately resulted in an unjust gain to the claimant,"<sup>49</sup> the simple fact that the defendant's business booked profits following a breach of fiduciary duty does not suffice as a causal link. In other words, the fact that profits follow breach is but a "narrative of brute sequence"<sup>50</sup> not a legally persuasive account of factual causation.

Separately, a disloyal fiduciary might argue that disgorgement should not reach the full extent of post-disloyalty profit because after a point, either other causal factors intervened or the causal force of the disloyalty otherwise came to an end. The best illustration is *SEC v. MacDonald*,<sup>51</sup> in which the director of a corporation bought shares of its publicly traded stock on the basis of favorable inside information that had yet to be publicly disclosed.<sup>52</sup> Following public disclosure, the price of the shares increased from \$4.625, the price at which the defendant purchased, to \$5.75;<sup>53</sup> twelve months later, the defendant sold at \$10 per share.<sup>54</sup> The defendant argued, and the First Circuit agreed, that his liability to disgorge profits should be measured by the differential between the price at which he bought the shares and the price at which they traded upon public disclosure of the information, and not by the larger differential realized by the defendant when he sold the shares.<sup>55</sup> Moreover, had the defendant reinvested the proceeds in another publicly traded stock which appreciated in value by the time his conduct came to light, he would not be liable for the gains from this subsequent investment.<sup>56</sup> The court reasoned that once the market price impounded the impact of the publicly-disclosed information, the defendant had reached "the point of his full gain from the fraud . . . ."<sup>57</sup> Thereafter he did only what others had the right to do, which is hold the stock he purchased and later sell it and reinvest the proceeds in another publicly traded stock. Thus, his post-public-disclosure gains were "not causally related to the fraud,"<sup>58</sup> which insider trading constitutes under the federal securities laws. More instrumentally, sellers of stock – defrauded through the defendant's purchase informed by inside information – might otherwise speculate at the expense of a fraudulent seller, perhaps waiting for subsequent movements in stock price to determine what course to take.<sup>59</sup>

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<sup>49</sup> *Id.* cmt. e(4).

<sup>50</sup> HART & HONORÉ, *supra* note 1, at 63.

<sup>51</sup> 699 F.2d 47 (1st Cir. 1983).

<sup>52</sup> *Id.* at 48.

<sup>53</sup> *Id.* at 49-50.

<sup>54</sup> *Id.* at 49.

<sup>55</sup> *Id.* at 55 (reversing the lower court judgment and ordering the disgorgement figure be based on the price of the stock a reasonable time after public disclosure).

<sup>56</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43, illus. 36 (Tentative Draft No. 4, 2005) (based on *MacDonald*).

<sup>57</sup> *MacDonald*, 699 F.2d at 54.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 53 ("Once the seller has discovered the fraud, he can protect against further

It is difficult to understand the outcome in *MacDonald* entirely within the confines of traditional accounts of causation. But for the defendant's purchase on the basis of inside information, he would not have held a particular asset that appreciated in value. The appreciation appears to be consequential gains that followed upon his initial transgression. Nor does it appear "remote" from the breach because nothing other than the operation of the stock market produced it. Moreover, the defendant's gain from post-public-disclosure appreciation stemmed solely from the fact that he continued to hold the stock, and not from the active intervention of a distinct causal force, whether embodied in the defendant or someone or something else.<sup>60</sup>

In deciding to hold the stock, the defendant was not, as it happens, situated identically to public investors who bought shares following public disclosure of the material information. The defendant in *MacDonald* may have continued to hold the stock because he believed his initial purchase on the basis of inside information would more likely elude detection the longer he delayed taking his gains by selling.<sup>61</sup> If so, he traded off the risk of subsequent declines in the trading price against the risk of detection, a tradeoff perhaps eased by his ongoing access to non-public information available through his insider status.

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damage by replacing the securities and should not be allowed to profit from a further appreciation, while being protected against depreciation by his right to recover at least the difference in value at the time of his sale." (quoting *Gerstle v. Gamble-Skogmo, Inc.*, 478 F.2d 1281, 1306 n.27 (2d Cir. 1973))). *MacDonald* remains of interest despite subsequent legislation capping the total amount of damages imposed on a defendant who violates prohibitions on trading on insider information or tipping others at "the profit gained or loss avoided in the transaction or transactions that are the subject of the violation." 15 U.S.C. § 78t-1(b)(1) (2006).

<sup>60</sup> In the conventional formulation, one causal force intervenes or supersedes another when it represents the "active and substantially simultaneous operation of the effects of a third person's innocent, tortious, or criminal act" that is a substantial factor in bringing about a particular harm. RESTATEMENT (SECOND) OF TORTS § 439 (1965). More metaphorically, an intervening cause could be characterized as "displacing the original conduct both as an explanation of the harm and, when later conduct is in issue, as a focus of responsibility." HART & HONORÉ, *supra* note 1, at xlviii-xlix. Metaphors, which abound in legal formulations of causal requirements, tend to reflect common sense. See *id.* at xlix ("The battery of metaphors found in the law in causal contexts, which at first sight seem so bizarre, are to be explained as reflections of the common-sense idea that where the analogy with manipulation [by the actor] is too remote the conduct cannot be regarded as causing the harm.").

<sup>61</sup> Two bases for this belief are sections 78p(a) and 78p(b) of the Securities Exchange Act of 1934. Section 78p(a), which requires that insiders report their transactions to the issuer, stock exchanges, and the SEC, is a well-known resource for public and private enforcers of prohibitions against insider trading. Section 78p(b) permits the issuer or a shareholder suing on its behalf to recover profit made or loss avoided by specific categories of insiders – including directors – in purchase-sale or sale-purchase transactions that occur within six-month intervals. Securities Exchange Act of 1934, 15 U.S.C. § 78p(a)-(b) (2006).

The defendant's eventual sale might also seem motivated by a hope of muddying the waters sufficiently to disguise his initial insider trading. Thus, the defendant's insider-trading transgression and the appreciation in market value that followed public disclosure may be causally linked, not separate phenomena as the court reasoned. Perhaps the court assumed that the defendant's investment decision to hold the stock was comparable to a decision to reinvest the proceeds in another publicly traded stock (for which the defendant lacked inside information) following sale of the initial tainted investment. If the defendant reinvests, he makes an investment decision that is decoupled from his initial culpable decision, and if the reinvestment rises in price, his profits likewise seem decoupled from his initial use of inside information.

One might rethink the problem posed by the *MacDonald* facts as a question of allocating burdens to prove or disprove causation – allocating to the defendant the burden of showing that, for example, he had a preexisting investment plan to invest in the stock that appreciated so dramatically.<sup>62</sup> So to allocate the burden is consistent with resolving doubts against the actor whose conduct was wrongful<sup>63</sup> when the claimant is unlikely to have access to evidence essential to satisfying the burden on causation, and when, as above, the defendant's post-transgression conduct may be motivated in part by the wish to conceal his wrongful conduct. On the other hand, to readers who perceive insider trading as a lesser form of fiduciary misconduct, depersonalized and intermediated as it is by public trading markets, it may be attractive to limit liability as did the *MacDonald* court. The basis for the limitation, though, is not the lack of but-for causal connection, but the judgment that the defendant's unjust enrichment extends only so far, to appreciation in the stock's market value up to the time the market price incorporated the information on which the defendant traded.<sup>64</sup> This is a limitation derived from a policy or all-things-considered judgment, not requirements of but-for causation.<sup>65</sup>

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<sup>62</sup> Robert B. Thompson, *The Measure of Recovery Under Rule 10b-5: A Restitution Alternative to Tort Damages*, 37 VAND. L. REV. 349, 385-87 (1984) ("The defendant should have the opportunity to prove that he would have obtained the benefit even without the fraud – for example, that he would have purchased the stock at the higher price once full disclosure had been made.").

<sup>63</sup> *Id.* at 390 ("Focusing on the defendant and resolving doubts against the party committing the fraud is consistent with the law of restitution and with the dual deterrent/compensatory purposes of the federal securities laws.").

<sup>64</sup> See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 51, cmt. e(1) (Tentative Draft No. 5, 2007) ("But 'remoteness' may also describe a judgment that the defendant will not be unjustly enriched, notwithstanding the existence of a causal connection, if the profit is retained.").

<sup>65</sup> Discussing analogous issues in the law of negligence, Hart and Honoré observe that [s]uch general notions of social policy and expediency seem to lie at the root of the rules by which courts circumscribe the harm recoverable in the tort of negligence,

Thus, although the vocabulary of disgorging ill-gotten gain is distinctive, it unquestionably embodies concepts of but-for causation and remoteness. To be sure, in some instances – a trustee’s disgorgement of misappropriated trust assets, for instance – it belabors the obvious to stress the presence of causal questions. But other instances of fiduciary disloyalty raise complex and wide-reaching issues that are more difficult to resolve.

## II. LOSSES CAUSED BY BREACH OF FIDUCIARY DUTY

### A. *The Basic Principle*

Beneficiaries betrayed by their fiduciaries often seek restitutionary remedies,<sup>66</sup> or interpose the breach of fiduciary duty as a defense to a suit by the fiduciary for breach of contract,<sup>67</sup> or seek to avoid contracts entered into with the fiduciary when the fiduciary has not appropriately obtained the beneficiary’s consent to a self-dealing transaction.<sup>68</sup> Additionally, long-standing authority in the United States subjects a fiduciary to liability to the beneficiary “for harm resulting from a breach of duty imposed by the relation,”<sup>69</sup> which entitles the beneficiary to recover tort damages,<sup>70</sup> including consequential<sup>71</sup> and, in appropriate cases, punitive damages.<sup>72</sup> The availability

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rather than any feeling that certain forms of harm brought about in certain ways are “unforeseeable” or “beyond the risk” or that it is intuitively unjust or inexpedient to make defendant pay compensation for them.

HART & HONORÉ, *supra* note 1, at 306. Determinations of unjust enrichment, in contrast, necessarily invite consideration of what is “intuitively unjust,” in contrast to recovery of economic loss consequent upon tortiously-inflicted physical injury, which is the focus of this passage.

<sup>66</sup> See *supra* Part I.

<sup>67</sup> 2 DAN B. DOBBS, LAW OF REMEDIES 668 (2d ed. 1993).

<sup>68</sup> RESTATEMENT (THIRD) OF AGENCY § 8.03, cmt. d (2006).

<sup>69</sup> RESTATEMENT (SECOND) OF TORTS § 874 (1979).

<sup>70</sup> *Id.* at cmt. b. (“The remedy of a beneficiary against a defaulting or negligent trustee is ordinarily in equity; the remedy of a principal against an agent is ordinarily at law. However, irrespective of this, the beneficiary is entitled to tort damages for harm caused by the breach of duty arising from the relation . . .”).

<sup>71</sup> See, e.g., *Widett & Widett v. Snyder*, 467 N.E.2d 1312, 1317 (Mass. 1984) (concluding mortgagor breached fiduciary duty owed to corporation as a director by using corporation to alter mortgage executed on behalf of law firm by failing to disclose to corporation his personal interest in assignment of mortgage; mortgagor/director subject to liability for legal fees incurred by corporation in defending suit brought by law firm).

<sup>72</sup> See, e.g., *In re Estate of Hoellen*, 854 N.E.2d 774, 787 (Ill. App. Ct. 2006) (upholding grant of punitive damages where breach of fiduciary duty was flagrant and intentional). Indeed, punitive damages may be an available remedy even when a jurisdiction does not recognize breach of fiduciary duty as a distinct tort. See *Kinesoft Dev. Corp. v. Softbank Holdings, Inc.*, 139 F. Supp. 2d 869, 913 (N.D. Ill. 2001). If a breach of fiduciary duty can be remedied, and the actor’s conduct was neither malicious nor fraudulent, punitive damages may not be available. See *Adams v. Coates*, 626 A.2d 36, 42 (Md. 1993)

of such tort damages does not preclude the plaintiff's additional recovery of disgorgement from a disloyal fiduciary and other restitutionary remedies.<sup>73</sup>

Although a fiduciary's disloyal act may harm the beneficiary, showing that harm resulted from the disloyalty is not requisite to the restitutionary remedy of disgorgement.<sup>74</sup> However, it is crucial to recovering damages in tort. This divergence exemplifies the "dualism" of fiduciary remedies described in the Introduction. Additionally, it further illustrates why metaphors derived from property are inadequate to explain the remedies available in the wake of fiduciary disloyalty.<sup>75</sup> That is, damages that quantify harm resulting from a breach of duty cannot plausibly be characterized as restoring to the beneficiary assets misappropriated or otherwise taken by a disloyal fiduciary. Such damages compensate the beneficiary and attempt to restore the beneficiary to her position prior to the fiduciary's breach, but are not geared to recapture benefits belonging to the beneficiary that the fiduciary appropriated through disloyal conduct.

#### B. *Standards for Assessing Causation*

Tort law in the United States has not been consistent over time in the vocabulary and concepts associated with causation. For present purposes, three basic distinctions are important to considering causation in connection with harm "resulting from" fiduciary disloyalty. First, tort law generally distinguishes between factual cause – often referred to as but-for or sine qua non causation – and proximate cause (also termed scope of liability).<sup>76</sup> An actor's conduct is a factual cause of an outcome "if, in the absence of the act, the outcome would not have occurred."<sup>77</sup> In contrast, determinations of proximate cause or scope of liability presuppose that an actor's conduct constituted a factual cause of an injurious outcome, but nonetheless consider

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(upholding denial of punitive damages after trial court found partner acted without fraud or malice).

<sup>73</sup> For a well-known instance in which a principal recovered a secret side-payment received by his former agent in connection with the principal's purchase of a business from sellers who made the side-payments, plus expenses incurred in suing the sellers to effect rescission of the purchase, plus the costs of operating the business prior to the rescission, see *Tarnowski v. Resop*, 51 N.W.2d 801, 802 (Minn. 1952), discussed at greater length in Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 ARIZ. L. REV. 925, 929-30 (2006).

<sup>74</sup> See *Nichols v. Minnick*, 885 N.E.2d 1, 4 (Ind. 2008) (stating that disgorgement is an appropriate remedy even where plaintiff "has suffered no demonstrable harm"). For the substantive point that an agent's loan to an adverse party may breach the agent's duty of loyalty to the principal unless the principal consents to the loan, see RESTATEMENT (THIRD) OF AGENCY § 8.03 cmt. c, illus. 4 (2006).

<sup>75</sup> See *supra* Part I.A.

<sup>76</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26, cmt. a (Proposed Final Draft No. 1, 2005).

<sup>77</sup> *Id.* at cmt. b.

whether the actor should be subject to legal responsibility.<sup>78</sup> Second, an actor's conduct might constitute "a" factual cause of an injurious outcome but not the sole or "the" cause.<sup>79</sup> Nonetheless, why should the fortuity of another cause – for example, another tortfeasor – exculpate an actor from the legal consequences of tortious conduct?<sup>80</sup> One solution is simply to acknowledge that each of several multiple acts may be a factual cause of a harm; an alternative solution treats a causal sequence as a factual cause of a harm when it constituted a "substantial factor" in causing the harm.<sup>81</sup>

Third, and finally, courts historically applied a less demanding analysis of causation when the plaintiff alleged injury inflicted by an intentional tort than in cases alleging negligent infliction of physical injury. In particular, in common law fraud cases,<sup>82</sup> discussed more fully in Part III, courts only rarely addressed questions of proximate cause and usually determined factual cause by whether the plaintiff proved reliance on the defendant's misrepresentation,<sup>83</sup> so long as the plaintiff's reliance was a "substantial factor in determining the course of conduct that result[ed] in his loss."<sup>84</sup> In contrast with negligently inflicted physical injury, harm resulting from fraud is likely to be closely linked to the fraud.<sup>85</sup> Additionally, fraudfeasors, like other actors who commit intentional torts, are morally blameworthy to a greater degree than are careless or hapless tortfeasors, and deterring fraud, like other intentional torts, does not seem likely to become socially inefficient.<sup>86</sup> For a victim of fraud, reliance on a fraudulent misrepresentation sufficed to establish factual cause under the Restatement (Second) of Torts, although "his reliance on the truth of the fraudulent misrepresentation [was not] the sole or even the predominant or

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<sup>78</sup> *Id.* § 29 (limiting liability for physical harm to those "that result from the risks that made the actor's conduct tortious").

<sup>79</sup> *Id.* § 27.

<sup>80</sup> *Id.* at cmt. c. To be sure, many tortious acts occur that do not cause harm, but in "our common understanding of causation" multiple sufficient causes are causes in fact of harm, regardless of the but-for standard. *Id.*

<sup>81</sup> See RESTATEMENT (SECOND) OF TORTS §§ 431-432 (1965). In contrast, Restatement (Third) of Torts jettisons the "substantial factor" terminology as confusing. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 26, cmt. j (Proposed Final Draft No. 1, 2005) ("The substantial factor test has not, however, withstood the test of time, as it has proved confusing and been misused.").

<sup>82</sup> See *infra* Part III.

<sup>83</sup> For a fuller discussion, see Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 832-33 (2009).

<sup>84</sup> RESTATEMENT (SECOND) OF TORTS § 546 (1977). The Restatement (Third) project has yet to address fraud and breach of fiduciary duty.

<sup>85</sup> Fisch, *supra* note 83, at 832 ("[T]he requirement in negligence cases that the plaintiff's harm be an expectable or foreseeable consequence of the defendant's actions does not apply to intentional torts.").

<sup>86</sup> *Id.* at 832-33.

decisive factor in influencing his conduct.”<sup>87</sup> Moreover, “[i]t is not even necessary that he would not have acted or refrained from acting as he did unless he had relied on the misrepresentation.”<sup>88</sup>

C. *Factual Cause and Breach of Fiduciary Duty*

Courts do not use the same standard to determine factual cause when a beneficiary seeks compensatory damages for harm allegedly resulting from a fiduciary’s disloyalty. While some cases use the “substantial factor” standard applicable to common law fraud, other cases require that the beneficiary establish that, but for the disloyalty, the harm would not have occurred. Although common law fraud both resembles and differs from fiduciary disloyalty, the “substantial factor” standard is preferable to stringent application of a “but for” standard. The substantial factor standard better advances the objective of accountability by fiduciaries that should animate the formulation of remedial doctrine in this context. If fiduciary doctrine properly embodies deterrent and prophylactic goals (as it does), the standard for factual cause should not undermine these goals, just as a more exacting standard in common law fraud cases, by reducing or eliminating the remedial consequences of fraud for its perpetrators, would undermine the objectives that underlie the tort. Alternatively, a court might consider whether fiduciary disloyalty might warrant shifting burdens on causation to the fiduciary in some instances.

In the leading case, *Milbank, Tweed, Hadley & McCloy v. Boon*,<sup>89</sup> a law firm represented its client’s former agent, without the long-standing client’s consent, in the acquisition of a business opportunity also sought by the long-standing client.<sup>90</sup> Applying New York law, the Second Circuit held that it sufficed for causation for the long-standing client to establish that the law firm’s representation of the former agent was “at least a substantial factor” that prevented her from acquiring the business assets.<sup>91</sup> It was neither necessary nor feasible for the court to determine that the long-standing client would have completed the transaction had her law firm not represented her former agent in the matter.<sup>92</sup> In a prior case, *ABKCO Music, Inc. v. Harrisongs Music, Ltd.*,<sup>93</sup>

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<sup>87</sup> RESTATEMENT (SECOND) OF TORTS § 546, cmt. b (1977). For further discussion of reliance and factual causation in this context, see John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001 (2006).

<sup>88</sup> *Id.* “Thus it is immaterial that he is influenced by other considerations, such as similar misrepresentations from third persons, if he is also substantially influenced by the misrepresentation in question.” *Id.*

<sup>89</sup> 13 F.3d 537 (2d Cir. 1994).

<sup>90</sup> *Id.* at 539-42.

<sup>91</sup> *Id.* at 543.

<sup>92</sup> *Id.* at 544 (“We need not and cannot determine whether or not Mrs. Leo would have successfully completed the transaction without Milbank’s conduct against her interests.”).

<sup>93</sup> 722 F.2d 988 (2d Cir. 1983).



the former business manager of then-former Beatle, George Harrison, breached his fiduciary duty by passing confidential information to the plaintiff in a copyright infringement suit, followed by Harrison's failure to settle the infringement suit. The former manager then acquired rights to the infringed work. The Second Circuit rejected the argument that an actionable breach of fiduciary duty requires a finding that the breach was "the proximate cause of injury to the principal."<sup>94</sup> No "'but for' relationship" was necessary to link the manager's disloyalty to the failed settlement because "[a]n action for breach of fiduciary duty is a prophylactic rule intended to remove all incentive to breach."<sup>95</sup> However, recent cases require that the fiduciary's disloyalty be a substantial factor in the harm suffered by the beneficiary<sup>96</sup> or a "real factor in bringing about" injuries.<sup>97</sup>

Other courts and jurisdictions require a beneficiary who seeks compensation for loss from a disloyal fiduciary to establish that, but for the breach, the loss would not have occurred. In several recent cases in which the court required but-for causation, the alleged breach of fiduciary duty is that of a lawyer or law firm and arises from facts also alleged to constitute legal malpractice.<sup>98</sup> In these cases, courts may be concerned not to undercut the stringent requirements for success in legal malpractice litigation.<sup>99</sup> Other cases, not involving claims of legal malpractice, require a but-for showing of causation to recover for harm allegedly stemming from fiduciary disloyalty more generally.<sup>100</sup> In all cases, the causal standard seems a function of the remedy

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<sup>94</sup> *Id.* at 995. In *ABKCO*, the injury was the failure of negotiations to resolve the underlying copyright infringement suit. *Id.*

<sup>95</sup> *Id.* at 995-96.

<sup>96</sup> See *Tethys Bioscience, Inc. v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, No. C 09-5115 CW, 2010 WL 2287474, at \*4 (N.D. Cal. June 4, 2010) (including "damage proximately caused by the breach" as an element of a claim for breach of fiduciary duty under California law (quoting *Stanley v. Richmond*, 41 Cal. Rptr. 2d 768, 776 (Ct. App. 1995))).

<sup>97</sup> See *Feinberg v. Eckelmeyer*, No. 2:09-cv-1536-WY, 2009 WL 4906376, at \*10 (E.D. Pa. Dec. 16, 2009) (quoting *McDermott v. Party City Corp.*, 11 F. Supp. 2d 612, 626 n.18 (E.D. Pa. 1998)).

<sup>98</sup> See, e.g., *Liberty Mut. Ins. Co. v. Gardere & Wynne, L.L.P.*, 82 F. App'x 116, 117 (5th Cir. 2003); *Hendry v. Pelland*, 73 F.3d 397, 398 (D.C. Cir. 1996); *Buch v. Holliday*, 803 S.W.2d 56, 59 (Mo. Ct. App. 1990); *Ulico Cas. Co. v. Wilson, Elser, Moskowitz, Edelman & Dicker*, 865 N.Y.S.2d 14, 18-19 (App. Div. 2008); *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 594 (App. Div. 2004).

<sup>99</sup> See *Carmel v. Lunney*, 505 N.Y.S.2d 735, 737 (App. Div. 1986) (finding that although criminal defendant's lawyers had an undisclosed conflict interest because they represented others under investigation in the same incident, the client's guilty plea precluded his ability to establish his lawyers' breach of fiduciary duty as the proximate cause of his damages).

<sup>100</sup> See *LNC Invs., Inc. v. First Fid. Bank, N.A.*, 173 F.3d 454, 465-66 (2d Cir. 1999); *Sheehy v. New Century Mortg. Corp.*, 690 F. Supp. 2d 51, 64 (E.D.N.Y. 2010) (requiring both "but-for" and proximate cause to prevail on a claim of breach of fiduciary duty).

sought by the beneficiary, because restitutionary remedies – including forfeiture of fees otherwise due a disloyal lawyer – escape the stringency of “but-for” causation.<sup>101</sup>

Requiring the beneficiary to show sine qua non causation may too sharply delineate or dissociate disloyalty from flawed performance. Although disloyalty’s consequences may be evident, disloyalty may also work more subtly to diminish the quality of work or to blind the fiduciary to the demands of loyal service.<sup>102</sup> Thus, looser causal requirements may be appropriate, especially when the beneficiary’s ability to prove but-for causation is limited by the nature of the relationship with the fiduciary. This is especially likely to be so when the fiduciary’s role requires the exercise of substantial discretion. To be sure, once the beneficiary and the court know that the fiduciary breached a duty of loyalty, for example by continuing to act on behalf of the beneficiary without obtaining the beneficiary’s consent to the fiduciary’s representation of an adverse party, the lens through which the fiduciary’s performance is viewed becomes clouded by knowledge of the fiduciary’s conflict or adverse position, which may seem in retrospect to have been causally more significant than it would have appeared if examined contemporaneously.<sup>103</sup> But perhaps this risk is appropriately borne by the fiduciary, who, after all, undertook to act loyally on the beneficiary’s behalf and then chose to act disloyally. At a minimum, perhaps the burden of proof – if but-for causation is the applicable standard – should fall on the fiduciary, not the beneficiary.

To be sure, in some cases – as in *Boon* – the beneficiary’s claims against the fiduciary go well beyond mere flaws in performance arguably induced by the fiduciary’s disloyalty because the fiduciary’s acts themselves are evidently and directly contrary to the beneficiary’s interests. In such cases, the beneficiary may readily show but-for causation. For example, suppose the fiduciary’s breach consists of deceitful statements made to the beneficiary that allay the beneficiary’s concerns about proceeding with a transaction.<sup>104</sup> On such facts,

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<sup>101</sup> See *Liberty Mut. Ins. Co.*, 82 F. App’x at 118; *LNC Invs., Inc.*, 173 F.3d at 465; *Am. Fed. Grp., Ltd. v. Rothenberg*, 136 F.3d 897, 980 n.7 (2d Cir. 1998); *Hendry*, 73 F.3d at 402.

<sup>102</sup> See *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907, 925 (S.D.N.Y. 1997) (“The unique nature of the attorney client relationship requires that attorneys be sensitive not only to obvious conflicts, but also to forces that might operate upon them subtly in a manner likely to diminish the quality of their work.”). Commenting on the defendants, lawyers who did not disclose a material conflict to their client, the court noted: “In light of the factual record in this matter, it is possible that defendants were not adequately attuned to certain economic forces operating upon them, and that they were not sufficiently forthright in revealing these forces” to their client. *Id.* at 926.

<sup>103</sup> See, e.g., *id.* at 927-28 (“Viewed through the lens of a potential conflict of interest, defendants’ otherwise defensible tactical decisions take on a more troubling gloss, and suggest at the least the possibility that defendants’ divided loyalties substantially contributed to [their client’s] defeat at arbitration [in which the defendants represented him].”).

<sup>104</sup> For a recent example, in which a plaintiff was allegedly induced into proceeding with

the fiduciary's misconduct may have sufficient causal force, independent of other possible causes, to satisfy a but-for standard of causation. Nonetheless, the objectives of fiduciary accountability range more widely than compensating beneficiaries who have been defrauded by their fiduciary or otherwise victimized by conduct that would be tortious even when committed by a non-fiduciary actor. These wider objectives require a more nuanced approach to factual causation.

### III. CAUSATION IN A BROADER FRAMEWORK

In some respects fiduciary disloyalty resembles the tort of common law fraud, with implications for the applicable standards of causation. In particular, many disloyal fiduciaries are, like fraudfeasors, dishonest and calculating when breaching a duty in a quest for personal gain.<sup>105</sup> Additionally, both the common law of fraud and fiduciary duty create rights that have absolute qualities that are not lessened by the victim's own conduct. Thus, fiduciary duty confers on the beneficiary the right to rely on the fiduciary's loyalty because creating such a right is the point of forming a fiduciary relationship. The beneficiary's rights against the fiduciary are not lessened because the beneficiary did not monitor the fiduciary's conduct as a self-help measure to detect instances of disloyalty because the point of imposing fiduciary duties is to entitle the beneficiary to trust the fiduciary. By analogy, the beneficiary is like the client of an auditor; the client's negligent failure to detect employee defalcations does not furnish a defense to the auditor if it, likewise, negligently fails to detect the same misconduct.<sup>106</sup> Likewise, a victim's contributory negligence is not a defense to intentional fraud.<sup>107</sup>

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a real estate transaction by the false statements of her attorney, see *Sheehy*, 690 F. Supp. 2d at 65.

<sup>105</sup> See Andrew Burrows, *Remedial Coherence and Punitive Damages in Equity*, in *EQUITY IN COMMERCIAL LAW* 381, 397 (Simone Degeling & James Edelman eds., 2005) ("[T]here is a close analogy between dishonestly committed torts, such as deceit, and the type of dishonestly committed breach of fiduciary duty in this case. Both concern the dishonestly committed breach of an imposed duty and, as in many typical cases triggering punitive damages, the defendants had cynically committed the breach of fiduciary duty in order to reap a profit."). Although I agree with Professor Burrows that fiduciary duties are "imposed," which I understand to mean imposed by law, their underlying source is beyond the scope of this Article.

<sup>106</sup> See *Nat'l Sur. Corp. v. Lybrand*, 9 N.Y.S.2d 554, 563 (App. Div. 1939) ("We are . . . not prepared to admit that accountants are immune from the consequences of their negligence because those who employ them have conducted their own business negligently.").

<sup>107</sup> As explained below, most courts require that a claimant establish reliance in fact on the false representation and that the reliance was justifiable. See *RESTATEMENT (SECOND) OF TORTS* § 537 (1977) ("The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, he relies on the misrepresentation in acting or refraining from action, and his reliance is justifiable."). Justifiable reliance

On the other hand, fiduciary disloyalty is in many ways less complex than common law fraud. For starters, the motives and knowledge of the disloyal fiduciary are not elements of the beneficiary's claim. In contrast, a misrepresentation of a matter of fact, opinion, or law is not fraudulent unless the maker "knows or believes that the matter is not as stated, or that he lacks 'the confidence in the accuracy of his representation that he states or implies,'" or that he "knows that he does not have the basis for his representation that he states or implies."<sup>108</sup> Additionally, although many acts of fiduciary disloyalty are deceitful, others are not.

More significantly from the standpoint of causation, the elements of common law fraud include a reliance requirement that is distinct from the requirement that the victim's reliance has been "a substantial factor in determining the course of conduct that results in his loss."<sup>109</sup> That is, one who makes a fraudulent misrepresentation is subject to liability only for "pecuniary loss suffered by one who justifiably relies upon the truth of the matter misrepresented" and the "reliance is a substantial factor in determining the course of conduct that results" in the loss.<sup>110</sup> Professor Goldberg and his co-authors argue that the point of the separate reliance requirement is the relational character of fraud as a tort.<sup>111</sup> In their account, "fraud is built on a relational directive requiring one to refrain from deceiving another to his or her detriment by intentionally making a misstatement."<sup>112</sup> Victim reliance, in short, completes the tort, connecting the intentional maker of a false statement to a victim with whose decision-making the misstatement interfered.<sup>113</sup>

Although a fiduciary's disloyalty may result in the beneficiary's decision to engage in a transaction – for example, if the fiduciary does not disclose a conflict that may bias its advice to proceed with a transaction – fiduciary disloyalty encompasses a broader range of misconduct and its consequences than does common law fraud. A fiduciary's disloyalty did not affect the beneficiaries in *Boon* and *Phansalkar* by inducing them to make decisions they

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requires that the matter misrepresented be material, defined alternatively by whether "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question" or "the maker of the misrepresentation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Id.* § 538. If a claimant meets either of these definitions of "justifiable" reliance, there's not much space left in which contributory negligence might operate. *See id.* § 545A ("One who justifiably relies upon a fraudulent misrepresentation is not barred from recovery by his contributory negligence in doing so.").

<sup>108</sup> RESTATEMENT (SECOND) OF TORTS § 526 (1977).

<sup>109</sup> *Id.* § 546.

<sup>110</sup> *Id.*

<sup>111</sup> *See* Goldberg, Sebok & Zipursky, *supra* note 87, at 1011 ("Reliance is what renders fraud a relational wrong and hence a tort.").

<sup>112</sup> *Id.*

<sup>113</sup> *See id.*

would not have made otherwise. The breach in *Boon* consisted of unconsented-to representation of a party with directly adverse interests and, in *Phansalkar*, of accepting side benefits from the principal's clients whose transactions the recipient facilitated. Nonetheless, fiduciary disloyalty, like fraud, is a form of relational wrongdoing; the relevant relationship is created when the fiduciary becomes subject to a duty of loyalty to the beneficiary.

#### CONCLUSION

Causation in the fiduciary realm is far from a narrative of brute sequence, whether the beneficiary seeks disgorgement of ill-gotten gains from a disloyal fiduciary or seeks compensation for harm inflicted by the disloyalty. In both instances, standards to assess causal connections should reflect the underlying objective of imposing liability for fiduciary disloyalty. This objective is to encourage the formation of relationships that have both intrinsic and socially instrumental value by furnishing legally binding assurances that fiduciaries will serve the interests of their beneficiaries in loyal fashion.<sup>114</sup>

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<sup>114</sup> Matthew Harding, *Manifesting Trust*, 29 OXFORD J. L. STUD. 245, 264 (2009).

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